COURT OF APPEALS DECISION DATED AND FILED

August 25, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2012

Cir. Ct. No. 2005PR289

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN RE THE ESTATE OF HAROLD J. SHOVERS:

SYLVIA A. SHOVERS,

APPELLANT,

DANIEL E. SHOVERS, BY HIS GUARDIAN AD LITEM, KEVIN J. DEMET,

CO-APPELLANT,

V.

GARY D. SHOVERS,

RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Sylvia A. Shovers and her grandson, Daniel E. Shovers, by his guardian ad litem, each appeal from a judgment declaring that Harold J. Shovers (Sylvia's husband) did not own fifty shares in Soref's Carpet City, Inc. (hereafter, "Carpet City") at the time of his death and that the shares therefore would not be included in the inventory of Harold's estate.[1] Sylvia raises three issues on appeal.[2] First, she argues that the trial court erred when it appointed her son, Gary Shovers, as personal representative. Second, Sylvia argues that, as a matter of law, Harold owned fifty shares of stock in Carpet City at the time of his death because the shares had not been transferred to Gary under the requirements of Carpet City's corporate bylaws. Finally, she argues that her motions for summary judgment and judgment notwithstanding the verdict should have been granted because Gary's testimony was inadmissible under the dead man's statute. We affirm the trial court as to each issue.

BACKGROUND

¶2 This case concerns fifty shares, or one-half of the authorized stock in Carpet City, a business that was started by Harold and his brother Al Soref in 1963. After Harold died in 2001, members of his family disagreed over whether Harold owned his fifty shares of stock at the time of his death or had transferred

[1] Because this case involves many family members with the last name Shovers, we will refer to each Shover using his or her first name.

[2] Although Sylvia and Daniel filed separate appeals and briefs, Daniel's arguments differ in form but not substance from those made by Sylvia. Consequently, we do not explicitly address Daniel's arguments; they are rejected for the same reasons we reject Sylvia's.

them to Gary, who already owned Soref's fifty shares.[3] Sylvia, assisted by her eldest son, Bradley Shovers, has been litigating the issue since August 2002. First, she filed a declaratory judgment action in civil court against Gary. After Gary was granted summary judgment, Sylvia appealed. We summarized the issues raised on appeal:

> Sylvia contends that she has standing to seek declaratory relief because she has an equitable interest in the assets of her husband's estate under their joint will, and "an interest that Soref's shares be declared part of the assets of Harold's estate based on her right to elect deferred marital property." Based on the assumption that she does have standing, Sylvia contends that the competent evidence shows that Harold died owning fifty shares of Soref's, because: (1) the dead man's statute bars Gary from testifying about transactions with Harold; (2) a 1993 agreement, allegedly setting forth a transfer of the shares from Harold to Gary, by itself, is insufficient; and (3) Gary never paid Harold the consideration cited in the 1993 agreement. As a result, Sylvia asks this court to reverse the trial court's order dismissing her claim and award her summary judgment.

Shovers v. Shovers, 2006 WI App 108, ¶1, 292 Wis. 2d 531, 718 N.W.2d 130 ("***Shovers I***"). We affirmed the trial court's conclusion that Sylvia lacked standing and, therefore, did not rule on Sylvia's remaining arguments. ***Id.***, ¶2. In affirming the trial court, we noted that Harold's estate, not Sylvia, "has the responsibility to determine whether the stock is part of the residual estate." ***Id.***, ¶39.

¶3 While Sylvia was litigating ***Shovers I***, she also filed a petition in probate court seeking the appointment of a special administrator for Harold's

[3] Gary's ownership of Soref's fifty shares is not disputed and is not involved in this proceeding.

estate. Specifically, she asked that Bradley (Daniel's father) be appointed special administrator.[4]

¶4 The trial court[5] ordered that a special administrator be appointed, but did not assign that role to Bradley or Gary. Instead, the trial court appointed attorney Patricia D. Jursik, who had no prior involvement in the case, as the special administrator. Jursik's assigned role was to "conduct discovery for purposes of determining whether reasonable grounds exist for the Estate to pursue a claim" against Gary and/or Carpet City for the fifty shares of Carpet City's stock. Jursik subsequently issued a report summarizing the background facts and analyzing whether the stock should be included in the inventory of the estate. She concluded that Harold did not own the stock at the time of his death and that the stock should not be "inventoried or included" in Harold's estate.

¶5 The trial court accepted Jursik's report and discharged her. Further proceedings were put on hold pending the resolution of ***Shovers I***, which eventually occurred in April 2006. Once the hold was lifted, the parties filed briefs in support of or objecting to Jursik's conclusions. The trial court overruled the objections, reaffirmed Jursik's discharge and dismissed the case because the special administration proceedings had concluded.

[4] Gary asserted that Bradley, Sylvia's attorney-in-fact, was actually driving the litigation. Whether Sylvia was personally involved in the litigation or delegated that authority to her son is not an issue that requires resolution, but we note this because one of the issues on appeal has to do with Gary and Bradley both wanting to be the personal representative of the estate.

[5] The Hon. Kitty K. Brennan considered Sylvia's motion to appoint a special administrator. Subsequent proceedings were conducted by the Hon. Michael J. Dwyer.

¶6 Three days later, Sylvia and Daniel both filed petitions for formal administration of the estate and sought to have Bradley appointed personal representative of the estate.[6] Gary did not object to the petitions for formal administration, or to Bradley's appointment as personal representative, as long as the conclusion of the special administrator would control what was included in the inventory.

¶7 After considering the appointment of a personal representative and whether Jursik's conclusions were binding, the trial court on December 5, 2006, decided that it was appropriate both to have formal administration of the estate and to appoint a personal representative. The trial court further decided that Jursik's report would not be binding on whoever was appointed personal representative, but that the report should be given some weight. The trial court indicated that it believed Gary should be appointed personal representative because he and Bradley, whom Harold named as co-personal representatives in the will, had opposing views on including the stock in the estate. The trial court said it believed Gary was the appropriate personal representative because Gary's position was consistent with that of Jursik, whose report would be persuasive authority but not binding authority on the parties. However, when Sylvia and Daniel sought time to brief the issue, the trial court deferred making a final decision until January 2007.

¶8 In January 2007, the trial court appointed Gary as the personal representative. It explained the reasons it had chosen Gary. First, although both

[6] In his response to Sylvia and Daniel's petitions, Gary noted that it was irregular to file the will and petition for formal administration in the same action that had just been dismissed, but he said he had no objection, especially because he had previously argued that Sylvia had no authority to bring a claim on behalf of the estate until probate proceedings were commenced.

Gary and Bradley were named co-personal representatives in the will, their positions on the ownership of the stock were "diametrically opposed" and appointing both of them would "create a deadlock." The trial court found good cause, as authorized by WIS. STAT. § 856.23(1)(e) (2007-08),[7] to conclude that Bradley was unsuitable to be personal representative, stating:

> The good cause shown is the determination by [the] Special Administrator[,] appointed on Sylvia's petition for special administration, in which Bradley joined and with which he agreed, concluded that the position Bradley promotes in this case is incorrect from a neutral, unbiased view of the Estate.

The trial court further found that Gary did not have "the kind of conflict of interest that disqualifies a personal representative." Exercising its discretion, it determined that it would be a reasonable course of action to appoint Gary because his position was consistent with Jursik's position. Thus, the anticipated litigation would proceed efficiently.

¶9 Next, based on Gary's representation that he did not intend, as personal representative, to file an inventory that included the fifty shares of stock,

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[7] WISCONSIN STAT. § 856.23 provides:

> **Persons who are disqualified. (1)** A person including the person named in the will to act as personal representative is not entitled to receive letters if the person is any of the following:
>
> ….
>
> (e) A person whom the court considers unsuitable for good cause shown.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

the trial court noted that any party who wanted to contest the exclusion of the stock could file an action pursuant to WIS. STAT. § 879.63.[8] In response, Sylvia and Daniel filed a summons and complaint and also demanded a jury trial concerning the issue of who owned the fifty shares of stock at the time of Harold's death.

¶10 The parties engaged in discovery and ultimately all filed extensively briefed motions for summary judgment. Sylvia moved *in limine* pursuant to WIS. STAT. § 885.16, commonly referred to as the dead man's statute, to prohibit Gary from testifying about "any transactions with … Harold regarding any alleged sale or gift of shares" to Gary. The trial court ruled that the dead man's statute precluded Gary from testifying about the meeting where he and Harold discussed the stock transfer, not only what was said, but what happened. However, the documents signed by Harold would be admissible if authenticated, and Gary would be allowed to testify about his possession of both the stock certificate and the 1993 Stock Sale Agreement ("Agreement"), as long as possession was separate from the transaction with Harold. The trial court denied all parties' motions for

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[8] WISCONSIN STAT. § 879.63 provides:

> **Action by person interested to secure property for estate.** Whenever there is reason to believe that the estate of a decedent as set forth in the inventory does not include property which should be included in the estate, and the personal representative has failed to secure the property or to bring an action to secure the property, any person interested may, on behalf of the estate, bring an action in the court in which the estate is being administered to reach the property and make it a part of the estate. If the action is successful, the person interested shall be reimbursed from the estate for the reasonable expenses and attorney fee incurred by the person in the action as approved by the court but not in excess of the value of the property secured for the estate.

summary judgment, noting there was evidence concerning the stock that suggested it was transferred to Gary, while other facts suggested it was not. The trial court also concluded that a jury trial on the factual issues would be appropriate.[9]

¶11 The case was tried to a jury. The jury heard the following testimony.[10] While in high school, Gary started working at Carpet City. He is the only one of Harold and Sylvia's children who ever worked at the store full time. After Gary graduated from high school, he continued working full time with his father at Carpet City.

¶12 In 1975, after a falling-out between Harold and Soref, Harold convinced Soref to sell his shares to Gary. Pursuant to an agreement, handwritten by Harold and dated December 31, 1975, Gary purchased Soref's shares. Soref signed the form on the reverse of Certificate 101 and thereby formally assigned his shares to Gary, to whom Certificate 103 was issued. Gary succeeded Soref as the secretary/treasurer of Carpet City. Soref ceased to be involved in the business and died in 1976.

¶13 Harold and Gary continued working together until 1984 when Harold underwent life-threatening surgery. On February 6, 1984, nine days before the surgery, Harold prepared and signed Certificate 104, which represented the transfer of fifty shares of Carpet City's stock to Gary. Gary found Certificate 104

[9] WISCONSIN STAT. § 879.45 specifically permits jury trials in probate proceedings in "all cases in which a jury trial may be had of similar issues under sec. 805.01(1)." No party has appealed the use of a jury.

[10] Because neither Sylvia nor Daniel sought a new trial or challenged the sufficiency of the evidence, we do not discuss all of the trial testimony. Rather, we provide the testimony that outlines the facts concerning the transfer of the stock.

in Carpet City's corporate records approximately six months after Harold's surgery. Harold survived the surgery, but experienced health problems; as a result, Gary took on a greater role at the business. In 1993, when Gary was gone for one week, Harold was in charge at the store. The employees expressed unhappiness with Harold, which caused Gary to talk with Harold about retirement. Gary said he and Harold talked about Gary acquiring the remaining fifty shares of stock. Gary said Harold retired and a few days later called Gary and told him to bring Harold "$350,000 in the Soref's bearer bonds, and I've got everything in writing for you."

¶14 Gary testified that he drove to Harold's house, gave him the bonds and received in exchange duplicate originals of a signed, notarized bill of sale for Harold's fifty shares.[11] Gary testified that he delivered the bonds to Harold in Sylvia's presence at their home. Sylvia denied this, but admitted that she did not know what a bearer bond was and that she probably would not recognize a bearer bond if she saw one.

¶15 The Agreement, dated May 6, 1993, was executed in duplicate originals. It is signed by Harold and notarized by Attorney J. Patrick Ronan, who testified that he did not draft the Agreement and did not remember Harold, but was sure, based on his review of the document, that he had notarized it. The Agreement provides in relevant part:

> I, HAROLD J. SHOVERS … hereby sell my fifty (50) shares of SOREF'S CARPET CITY, INC. stock to my son, GARY D. SHOVERS … for and in consideration of the

[11] During the litigation this document was called the 1993 Agreement or the Stock Sale Agreement. In this opinion we refer to it as the Agreement. It appears undisputed that Harold, who had a law degree, drafted the Agreement himself.

> sum of One Dollar ($1.00) and other good and valuable consideration, already granted to BRADLEY T. SHOVERS and JUDITH SHOVERS adequately providing for each of them financially.
>
> After completion of this agreement, GARY D. SHOVERS will own one hundred (100) shares of SOREF['S] CARPET CITY, INC. stock. As a result, GARY D. SHOVERS will be the One Hundred percent (100%) owner of SOREF'S CARPET CITY, INC.
>
> This Agreement takes effect immediately upon the date the agreement is executed by HAROLD J. SHOVERS.

(Capitalization as in the original.)

¶16 The jury was also shown copies of the four stock certificates.[12] The assignment form on the reverse of Harold's original stock certificate, number 102, was not filled out at the time Harold created Certificate 104 or when he delivered the Agreement to Gary. The corporate books and records were never kept anywhere but in Carpet City's store from 1970 onward. After receiving the Agreement, Gary had possession of everything at Carpet City's store, including Certificate 104.

¶17 Gary acknowledges that neither he nor Harold followed the details of the corporate bylaws. They did not follow the bylaws rules for stock transfer in 1993. Although Soref died in 1976, he remained the registered agent until 1990, when Gary changed the registered agent to himself. Harold, as president of Carpet City, failed to follow many corporate bylaws. There is no evidence that formal annual board or shareholder meetings occurred, that shareholders actually

[12] A total of four stock certificates, each for fifty shares of stock, have been issued by Carpet City since its inception. These are: Certificate 101 to Soref on June 15, 1963; Certificate 102 to Harold on June 15, 1963; Certificate 103 to Gary on January 1, 1976; and Certificate 104 to Gary on February 6, 1984.

regularly elected officers or directors, or that annual consent resolutions were prepared in the year to which they relate. Neither Certificate 103 nor 104, which Harold prepared, has the signature of the corporate secretary. Both Certificates 101 and 102 bear a stamp on the front that reads: "CANCELLED." The stamp, and consent resolutions to ratify corporate actions that occurred over the years from 1993 to 2002, were added by an attorney retained by Gary after Harold's death and after Sylvia began litigation against Gary.

¶18 Ultimately, the jury was asked to answer a single question: "Did Harold Shovers own 50 shares of Soref's stock when he died?" The jury's answer was no.

¶19 Sylvia moved for judgment notwithstanding the verdict. She made three arguments: (1) the transfer of shares to Gary constituted an action taken by Carpet City in contravention of its bylaws and was therefore void; (2) Gary had the burden to prove he was the sole owner of Carpet City; and (3) the dead man's statute rendered Gary incompetent to testify about face-to-face transactions with Harold. The trial court denied the motion and this appeal follows.

DISCUSSION

¶20 On appeal, Sylvia presents three arguments. First, she argues that the trial court erred when it appointed Gary as personal representative. Second, Sylvia argues that, as a matter of law, Harold owned fifty shares of stock in Carpet City at the time of his death because the shares had not been transferred to Gary under the requirements of Carpet City's corporate bylaws. Finally, she argues that her motions for summary judgment and judgment notwithstanding the verdict should have been granted because Gary's testimony was inadmissible under the dead man's statute. We consider each argument in turn.

I. Appointment of Gary as personal representative.

¶21 Sylvia argues that the trial court was required by WIS. STAT. § 856.21[13] to appoint Bradley as personal representative because he was nominated in the will and was not disqualified under WIS. STAT. § 856.23. She argues that Gary, who was also nominated in the will, had a conflict of interest because he claims to own the stock which she asserts was part of Harold's estate.[14]

¶22 WISCONSIN STAT. § 856.21 directs the trial court to appoint as personal representative, unless disqualified, anyone "named in the will to act as personal representative." WISCONSIN STAT. § 856.23 permits a court to disqualify a personal representative "whom the court considers unsuitable for good cause shown." What constitutes "unsuitable for good cause shown" is a question of law we review *de novo*. ***Klauser v. Schmitz***, 2003 WI App 157, ¶7, 265 Wis. 2d 860, 667 N.W.2d 862. There "'must be a measure of discretion in determining whether the particular conflict of interest is serious enough to prevent appointment or compel removal' of a personal representative." ***Id.*** (citation omitted). "[E]xcept

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[13] WISCONSIN STAT. § 856.21 provides:

> **Persons entitled to domiciliary letters.** Letters shall be granted to one or more of the persons hereinafter mentioned, who are not disqualified, in the following order:
>
> **(1)** The person named in the will to act as personal representative.
>
> **(2)** Any person interested in the estate or the person's nominee within the discretion of the court.
>
> **(3)** Any person whom the court selects.

[14] By his participation in ***Shovers I***, and in the special administration proceedings, Bradley claimed the disputed stock was owned by Harold at his death. Sylvia does not argue this would have presented a conflict of interest for Bradley.

for very cogent reasons the courts follow the maxim[,] 'Whom the testator will trust so will the law.'" ***Id.***, ¶8 (citation, one set of quotation marks and one set of brackets omitted). As innumerable circumstances may arise, "[a] conflicting personal interest preventing an executor or administrator from doing his duty renders him unsuitable." ***Keske v. Marshall & Ilsley Bank***, 18 Wis. 2d 47, 52, 117 N.W.2d 575 (1962).

¶23 Here, the trial court noted that Gary and Bradley "simply cannot agree on what day of the week it is, much less what assets are going to be a part of the estate." The trial court concluded that the level of hostility between the two brothers would result in a stalemate in the estate. A trial court may disqualify a nominee as unsuitable based on a conflict which did not exist when the testator executed the will or a situation which the testator could not reasonably have anticipated. *See* ***id.*** at 53-54. We consider the trial court's finding of animosity to be good cause for the implicit conclusion that it would be problematic to have Gary and Bradley serve as co-personal representatives. *See* WIS. STAT. § 856.23(1)(e).

¶24 It is apparent from the record before us that Harold strove to avoid court involvement in his financial matters after his death. Although Harold enjoyed substantial personal wealth, from which he made significant gifts to his children during his life, no clearly identifiable probate assets were located. Harold left two pages of detailed handwritten instructions for distribution of personal property and various other actions to be taken at his death (e.g., searching his pockets before disposing of his clothes), but the instructions did not mention

Carpet City's stock. Harold's two wills,[15] likewise, include no mention of the stock.

¶25 The trial court then reasoned that the report of the special administrator, while not controlling, was entitled to some weight and concluded that the "special administrator process did not allow the issue of the ownership of the stock to get litigated." The trial court next considered whether Gary or Bradley individually could perform the role of personal representative appropriately. The trial court observed Sylvia and Bradley were "allied shoulder to shoulder in all respects throughout," having initiated both the prior litigation and the special administration proceedings which produced the report and inventory to which they now object. Thus, the trial court reasoned, if only Bradley was appointed, no weight would be given to Jursik's report because Bradley would file an estate inventory that included the stock described in Certificate 102.

¶26 Gary had no conflict with Jursik's report. The trial court noted that Gary, as personal representative, would file an inventory consistent with Jursik's report showing no probate assets. That inventory would allow Sylvia and Bradley to proceed under WIS. STAT. § 879.63, assuming the burden of proof to establish that the stock represented by Certificate 102 had been improperly excluded from the estate. Under the circumstances, the trial court concluded that appointing Gary as personal representative would permit litigation of ownership of the disputed stock, while still giving some weight to Jursik's report.

[15] Harold executed a will dated September 16, 1999. He executed his final will, a joint and mutual will with Sylvia, dated October 14, 2000. It is the October 2000 will that was admitted to probate.

¶27 The trial court's decision to appoint Gary balanced Harold's wishes as to appointment of a personal representative, insofar as reasonably practicable under the circumstances, against the need to fashion a practical solution to the animosity between the two nominees for personal representative that would allow reasonable and efficient administration of the court's calendar to obtain final resolution of the disputed stock ownership. The trial court properly exercised its discretion.

¶28 Sylvia complains that she had to assume a burden of proof when she chose to continue litigation under WIS. STAT. § 879.63. The trial court did not assign Sylvia a burden of proof. The additional litigation was her choice. The burden of proof was created by statute. At most, its allocation is a collateral consequence of the trial court's proper exercise of its discretion in appointing a personal representative. Sylvia offers no argument that she was prejudiced by her decision to proceed under § 879.63, except that the jury found her evidence did not rise to the level of a preponderance. Because we have affirmed the trial court's exercise of discretion in appointing a personal representative, we do not consider this complaint further.

II. Impact of Carpet City's corporate bylaws.

¶29 Sylvia asserts that Harold's undisputed failure to follow the corporate bylaws relating to transfer of corporate stock means that, as a matter of law, Harold still owned the stock represented by Certificate 102 at the time of his death. Therefore, Sylvia concludes, the stock is an asset of Harold's estate and she was entitled to summary judgment to that effect and, after the jury trial, to judgment notwithstanding the verdict.

¶30 In response, Gary argues that the bylaws are a contract between shareholders, the provisions of which may be waived or modified by the conduct of the shareholders. Therefore, Gary asserts, there were numerous disputed material facts bearing on whether the transfer provisions were modified by the conduct of the parties and whether a valid transfer occurred in spite of non-compliance with the bylaws. Applying the well-known standard of review for denial of summary judgment,[16] we agree with Gary that because a valid transfer of stock ownership can occur even where there is noncompliance with corporate bylaws, and because there are disputed facts as to whether a valid transfer occurred, Sylvia was not entitled to summary judgment.

¶31 Assuming that Harold had title to the stock at his death, title alone does not determine ownership of the stock. *See, e.g.*, ***Hoffmann v. Wausau Concrete Co.***, 58 Wis. 2d 472, 207 N.W.2d 80 (1973) (certificates prepared, but dominion, control and benefit not relinquished); ***Dahlke v. Dahlke***, 25 Wis. 2d 559, 131 N.W.2d 362 (1964) (certificate stub from corporate record book, without dominion and control over stock is insufficient); ***State v. Heller***, 210 Wis. 474, 246 N.W. 683 (1933) (certificate prepared but not delivered does not establish ownership). "It is a general rule that the principles which govern the construction of contracts also govern the construction and interpretation of corporate bylaws." ***State ex rel. Siciliano v. Johnson***, 21 Wis. 2d 482, 487, 124 N.W.2d 624 (1963). Parties to a contract may modify its terms by their conduct. ***Royster-Clark, Inc. v.***

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[16] In reviewing the denial of a motion for summary judgment, we apply the same methodology as the trial court and review *de novo* the grant or denial of summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

Olsen's Mill, Inc., 2006 WI 46, ¶¶20-23, 290 Wis. 2d 264, 714 N.W.2d 530 (The requirement under the UCC that a contract not be modified except in writing can be waived by the conduct of the parties accepting oral modifications.). The parties' longstanding relationship and pattern of conduct may be strong evidence of modification. *See* ***id.***, ¶28. "'Modification must be made by the contracting parties or someone duly authorized to modify, and one party to a contract cannot alter its terms without the assent of the other parties; the minds of the parties must meet as to the proposed modification.'" ***Nelsen v. Farmers Mut. Auto. Ins. Co.***, 4 Wis. 2d 36, 55, 90 N.W.2d 123 (1958) (citation omitted).

¶32 Here, the bylaws in effect when Harold created Certificate 104 in 1984 and when he executed the Agreement in 1993, made the following provisions for issuance and transfer of shares.

> ARTICLE VI
>
> Section 1 – Certificates for Shares.
>
> Certificates representing shares of the corporation shall be in such form as shall be determined by the Board of Directors. Such certificates shall be signed by the President or the Vice President and by the Secretary. All certificates for shares shall be consecutively numbered or otherwise identified. The name and address of the person to whom the shares represented thereby are issued, with the number of shares and date of issue, shall be entered on the stock transfer books of the corporation. All certificates surrendered to the corporation for transfer shall be cancelled and no new certificate shall be issued until the former certificate for a like number of shares shall have been surrendered and cancelled….

> Section 2 – Transfer of Shares.
>
> Transfer of shares of the corporation shall be made only on the stock transfer books of the corporation by the holder of record thereof … who shall furnish proper evidence of authority to transfer … and on surrender for cancellation[[17]] of the certificate for such shares. The person in whose name shares stand on the books of the corporation shall be deemed by the corporation to be the owner thereof for all purposes.

¶33 None of the four stock certificates issued on behalf of Carpet City complied with *all* of the requirements of the bylaws. When Soref was the secretary, Certificates 101 to Soref and 102 to Harold were issued. Neither certificate contained the address of the person to whom the certificate was issued, as required by Article VI, Section 1. Certificate 103, issued to Gary when he bought Soref's stock, contained no address for Gary and was signed by Harold, but not by the secretary of the corporation. Certificate 104, issuing another fifty shares of stock to Gary on February 6, 1984, was again signed by Harold and again had no corporate secretary signature or address for Gary. Although the certificates may have been "surrendered" by leaving them in possession of the corporation, neither Certificate 101 or 102 were marked "cancelled" at the time of that "surrender."

¶34 It is apparent from the conduct of the shareholders that they modified the bylaws by their conduct. Neither Soref nor Harold followed all the bylaws' requirements. Harold never removed Soref as registered agent, even after

[17] The bylaws require the owner of shares to "surrender for cancellation" the certificate for those shares as a step to effect the transfer of the shares on the corporate books. Here, because the shares apparently never left the possession of the corporation, they may have been effectively surrendered to the corporation when the owner evidenced intent to transfer his shares. The corporation's failure to "cancel" the certificate with a stamp or other writing would not appear to negate other evidence of the owner's intent to transfer ownership.

Soref died. After Soref left, Harold did not follow all of the transfer requirements in 1984 when he issued Certificate 104. In 1993, Harold left the business, and thereafter Gary, as the only shareholder, did not hold annual meetings or prepare annual consent resolutions to establish what he as the corporation had done each year.

¶35 Although Gary continued after 1984 to file reports with the State of Wisconsin identifying Harold as president, Sylvia as vice-president and himself as secretary/treasurer, no corporate meetings of any kind were held. Nor is there evidence that any corporate meetings were held by Soref and Harold after the first meeting adopting organizing resolutions and bylaws.

¶36 Beginning no later than when Gary bought Soref's shares in 1975 and Certificate 103 was issued, Harold and Gary ignored most of the bylaws' record-keeping requirements. As the only shareholders, they had the power and authority to modify the bylaws by their conduct and they did so. Essentially, they ignored many parts of the bylaws which described a process for transferring ownership of shares of stock. Gary and Harold worked together, in the same office, and/or Harold regularly visited the store, from 1975 through May 1993. There is no indication in the record that either ever objected to the lack of compliance with the bylaws. By their conduct over the course of those eighteen years, the record demonstrates their agreement to substantially ignore the bylaws, including the requirements for transfer of stock ownership. Although incorporated, this was a small family business. It was never owned by more than two people. The shareholder(s) were also the managers, who, after formal incorporation, paid more attention to running a profitable business than to complying with all of the corporate bylaws. A clearer example of mutual waiver of the bylaws conditions by the conduct of the shareholders is hard to imagine. If

Harold or Sylvia had believed themselves to still be owners or officers of the corporation after 1993 and before Harold's death, they could have, but did not, attempt to enforce conduct described in the bylaws.

¶37 For these reasons, we conclude that Sylvia was not entitled to summary judgment based on Gary and Harold's failure to follow Carpet City's corporate bylaws to the letter. Whether the stock was transferred to Gary presented a question of fact that was appropriately presented to the jury for resolution.

III. Competency of the evidence in light of the dead man's statute.

¶38 Sylvia's final argument is that "the competent evidence points to only one conclusion: Harold died owning" fifty shares of Carpet City's stock. Specifically, she argues that her request for summary judgment should have been granted and that she should have had judgment notwithstanding the verdict, because Gary's testimony was inadmissible under what is known as the dead man's statute, WIS. STAT. § 885.16.[18]

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[18] WISCONSIN STAT. § 885.16 provides:

(continued)

¶39 The dead man's statute, as applicable to the facts here, prohibits a party who derives interest or title from a deceased person from testifying as a witness "in respect to any transaction or communication by the party … personally with a deceased … person in any civil action" if the opposing party in that action "derives his or her title" from the deceased person. ***Id.*** This prohibition disappears if the "opposite party shall first, in his or her own behalf, introduce testimony of … some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given.…" ***Id.*** The benefit of the statute is waived when the opposite party opens the door to otherwise prohibited testimony. *See* ***Johnson v. Mielke***, 49 Wis. 2d 60, 71, 181 N.W.2d 503 (1970) (collecting cases).

¶40 Before trial, Sylvia obtained an order *in limine* pursuant to WIS. STAT. § 885.16 that prohibited Gary "from testifying about any conversation he

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> **Transactions with deceased or insane persons.** No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased or insane person, or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates. And no stockholder, officer or trustee of a corporation in its behalf or interest, and no stockholder, officer or trustee of a corporation from, through or under whom a party derives the party's interest or title, shall be so examined, except as aforesaid.

had with Harold at any time, about the transaction between Gary and Harold regarding the document entitled the 'Stock Sales Agreement' dated May 6, 1993, including both the execution and delivery of the agreement." However, the trial court indicated that it would permit "introduction of the [1993] Agreement and the stock certificates for Soref's at all times *except* when [Gary] is in the presence of Harold."

¶41 Sylvia derives any interest she may have in Harold's estate from Harold. Gary derives any interest he may have in stock originally represented by Certificate 102 from Harold. Both Sylvia and Gary claim an interest adverse to each other and derived from Harold, who is deceased. Thus, WIS. STAT. § 885.16 allowed Sylvia to keep Gary from testifying about conversations and transactions with Harold relating to the stock. *See **id.*** However, she waived that protection when she elicited testimony about Harold's conversations and transactions with Gary relating to the stock. She elicited that testimony from Gary, whom she called adversely as her first witness, and examined him extensively about both conversations and transactions he had with Harold relating to the stock and the Agreement.

¶42 Sylvia's reliance on the dead man's statute as a basis to obtain judgment against Gary is unfounded in view of her action at trial. She asserts that Gary should not have been allowed to testify about the Agreement and other matters, but Sylvia began her case at trial by calling Gary adversely and examining him at length before the jury about his face-to-face dealings with Harold, the negotiations leading to the Agreement and delivery of the bearer bonds in consideration for the Agreement. It is difficult to imagine a more complete waiver of the protection she had under WIS. STAT. § 885.16, and under the order she had obtained, than the waiver she made by her own strategic trial choice to initiate the

very testimony she had a right to bar. The benefit of the statute is waived when the opposite party opens the door to otherwise prohibited testimony. *See* ***Johnson***, 49 Wis. 2d at 71.

¶43 To the extent Sylvia attempted to reserve her right to appeal the trial court's failure to completely grant her motion *in limine*,[19] she has not identified the specific testimony that was allowed by the order *in limine* and how that prejudiced her. We do not consider undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

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[19] Just prior to the commencement of trial, the trial court stated:

> The Dead Man Act has been waived by the Plaintiff on learning that the Court would not permit it or them to decide whether or not to waive it after opening statements.… [B]ased on that ruling, [Sylvia's counsel] advised the Court that, preserving that objection, he is going to waive it….

Sylvia's counsel responded: "Right, we believe we preserved our objection with the earlier motion we made and the Court granted in part and denied in part, so that's my understanding."